In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 995

T. A. SMALL,
Petitioner,

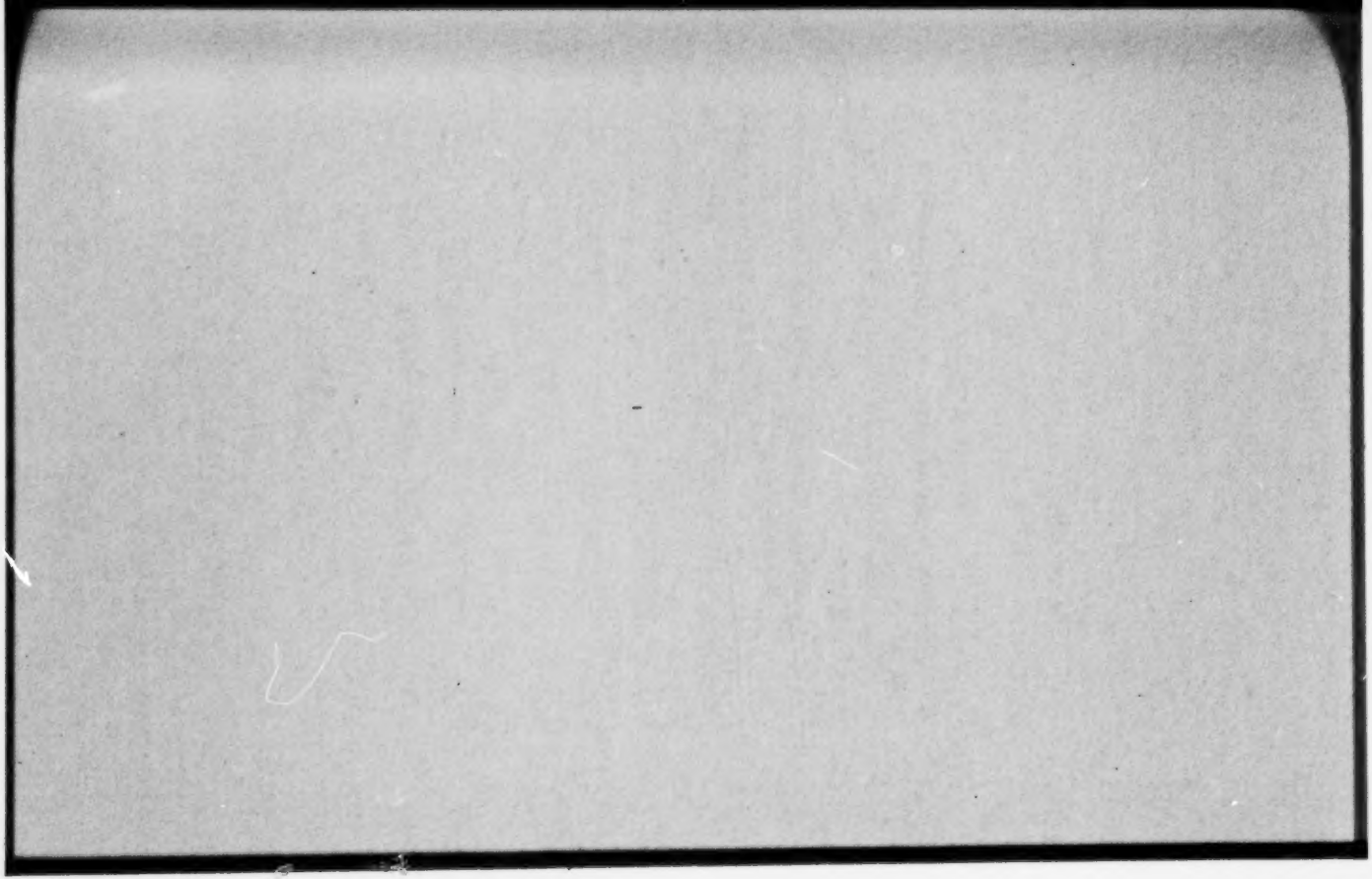
vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

MAX H. MARGOLIS,
1650 Russ Building, San Francisco 4, California,
Counsel for Petitioner.

FRED MCDONALD,
Mills Tower, San Francisco 4, California,
Of Counsel.



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to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, T. A. Small, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment of said court, entered January 25, 1946,

affirming the judgment of the District Court of the United States for the Northern District of California, Southern Division.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is contained in the record. (R. 50-54.) No opinion was rendered by the Circuit Court of Appeals in denying a petition for rehearing on February 26, 1946. (R. 55.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

By an information with a single count petitioner was charged with violating the Emergency Price Control Act of 1942 (50 U.S.C.A., secs. 902 (a), 904 (a), 925 (b)) by selling 100 cases of certain whiskey at a price "in excess of and higher than the maximum price established by law". (R. 2-3.) He pleaded "Not Guilty" (R. 4), and a jury trial was had. (R. 5-6.)

When the Government rested its case, the petitioner also rested (R. 34) and moved for a directed verdict (R. 35.) In denying this motion, the trial court said in the absence of the jury, "I am going to tell the jury that there was no sale but there was an attempted sale." (R. 35.) The jury was thereafter instructed that the evidence did not support the charge of sale (R. 36, 38), but that petitioner

might be found guilty of "an attempt to sell" (R. 38.) Neither the Government nor the petitioner objected or excepted to these instructions. (R. 41.)

Contrary to the law thus declared by the trial court, the jury found petitioner guilty of sale. (R. 7.) And contrary to the law thus declared to the jury, the trial court denied a motion for new trial specifying that the verdict was contrary to law (R. 7-8) and entered judgment sentencing petitioner to imprisonment for six months on the jury verdict convicting him of sale. (R. 10-11.)

The judgment thus entered contrary to law on a verdict contrary to law, was affirmed by the Circuit Court of Appeals. (R. 54-55.) It rejected the law of the case as declared by the trial court to the jury. It determined upon an erroneous conception of the law of sales that the evidence supported a conviction of sale. The scope of the decision, therefore, is to sanction refusal by a jury, in the administration of criminal justice, to accept the law as declared by the trial court, to sanction acceptance by a trial court, in the administration of criminal justice, of the law as dictated by the jury, and to sanction disregard by an appellate court, in the administration of criminal justice, of the law of the case established in the trial court.

JURISDICTION.

Jurisdiction of this court is invoked under section 240 of the Judicial Code. (28 U.S.C.A., sec. 347 (a).)

QUESTIONS PRESENTED.

1. In the proper administration of criminal justice, may a trial court enter judgment on a jury verdict which is contrary to the law as declared by the trial court?

2. In the proper administration of criminal justice, may an appellate court base an affirmance of such judgment on the ground that the trial court had wrongly declared the law to the jury?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(a) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court and with decisions in other circuits on a serious question in the administration of criminal justice by trial courts.

In all civil and criminal cases in the federal courts the rule is general that "it is the duty of the jury to accept the law as declared by the court."

> *Hepner v. United States,* 213 U. S. 103, 29 S. Ct. 474, 479, 52 L. Ed. 720.

With more elaboration, the rule is stated in *Sparf v. United States,* 156 U. S. 51, 101, 15 S. Ct. 273, 293, 39 L. Ed. 343, 361, as follows:

> "We must hold firmly to the doctrine that in the courts of the United States it is the duty

> of juries in criminal cases to take the law from the court, and apply that law to the facts as they, upon their conscience, believe them to be. Under any other system, the courts although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.

And in *Stetson v. Stindt,* 3 Cir., 279 F. 209, where a verdict by the jury was contrary to the law as declared by the trial court but the court nevertheless entered judgment on the verdict, it was said at page 211 after a review of pertinent cases:

> "We are persuaded by the *ratio decidendi* of the last line of authorities that a verdict like the one under consideration, which is perverse and directly violative of the charge of the court and is wholly without evidence to support it, cannot stand. It is not sufficient to say that the defendant cannot complain because he was not injured. He was injured by being deprived of the right of a litigant to have the jury determine his liability under the law as laid down by the court."

That the verdict against petitioner violated the rule of the foregoing cases, is plain. The information contained but one charge—that of sale. (R. 2-3.) The court instructed the jury that petitioner could

not be convicted of sale, but might be convicted of "an attempt to sell". (R. 36, 38.) The jury nevertheless returned the following verdict: "We, the Jury, find T. A. Small, the defendant at bar Guilty". (R. 7.) This was a conviction on the charge of sale. The decision of this court in *St. Clair v. United States,* 154 U. S. 134, 14 S. Ct. 1002, 1010, 38 L. Ed. 936, leaves no doubt in this respect. It was there said:

> "The indictment contained but one charge,—that of murder. The accused was arraigned, and pleaded not guilty of that charge. And while the jury had the physical power to find him guilty of some lesser crime necessarily included within the one charged, or of an attempt to commit the offense, the law will support the verdict with every fair intendment, and therefore will, by construction, supply the words 'as charged in the indictment.' The verdict of 'guilty' in this case will be interpreted as referring to the single offense specified in the indictment. And this principle has been incorporated into the statute laws of some of the states; as in California whose Penal Code declares that a verdict of 'Guilty,' or 'not Guilty,' shall import a conviction or acquittal of the offense charged in the indictment. Section 1151."

The trial court approved and confirmed the perverse verdict convicting petitioner of sale, by entering judgment thereon. (R. 11.) It thereby relaxed its duty to declare the law in criminal cases. It thereby tolerated encroachment upon that duty by the jury. It thereby permitted the jury to impair

that duty. If the system under which criminal justice has heretofore been administered in the federal courts is to be preserved and maintained, it is obvious that relaxation, toleration, and permission in such respects should be speedily curbed. The affirmance of the judgment by the Circuit Court of Appeals was a step the other way.

(b) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court and with its own decisions and decisions in other circuits on a serious question in the administration of criminal justice by appellate courts.

On denying the motion for a directed verdict, the trial court said, "I am going to tell the jury that there was no sale but there was an attempted sale". (R. 35.) This was an assurance to petitioner that he need not propose or request instructions on the law of sales. Pursuant to said promise, the trial court instructed the jury that petitioner could not be convicted of sale but might be convicted of "an attempt to sell". (T. 36, 38.) Neither the Government nor the petitioner objected or excepted to these instructions. (R. 41.) Nowhere in the jury charge was the law of sales expounded. (R. 36-41.) Accordingly it became the law of the case, binding on the jury, binding on the trial court, and binding on the appellate court that petitioner could not be convicted of sale. The general rule in this respect is thus stated in 53 American Jurisprudence 620, sec. 844:

> "An instruction not objected or excepted to is not before the appellate court for review, but must for the purpose of the case be taken as the law. Right or wrong the instruction becomes

> the law of the case and is binding upon the jury, except where they are judges of the law, as well as on the court and counsel."

Cases earlier cited confirm this general rule in its application to civil and criminal cases in federal courts.

Hepner v. United States, 213 U.S. 103, 29 S. Ct. 474, 479, 52 L. Ed. 720;

Sparf v. United States, 156 U.S. 51, 101, 15 S. Ct. 273, 293, 39 L. Ed. 343, 361;

Stetson v. Stindt, 3 Cir., 279 F. 209, 211.

The doctrine of the law of the case therefore demanded that the judgment be reversed. But the Circuit Court of Appeals rejected the law of the case and affirmed the judgment because it deemed the evidence sufficient to warrant a conviction under the law of sales as announced by it on appeal. Accordingly, the effect of the decision is that in criminal cases a conviction and judgment contrary to law may be affirmed if the appellate court revises the law on appeal. This must necessarily operate to deprive the defendant in a criminal case of substantial rights. Primarily, it deprives him of the right to have the jury determine his guilt on the law as declared by the trial court. And it leaves him bewildered and unprepared in proposing and requesting instructions, for no matter what the trial court may say or do he must anticipate that an appellate court will say or do something different to support whatever verdict the jury may render.

Perhaps it may be said that in humble cases like the present the injury to a defendant cannot be great even if he is denied the full measure of due process of law. But the rule thus innovated would have equal application to a charge of murder. If on the trial of a murder charge the court had accepted a verdict finding the defendant guilty of murder and had sentenced him to death in the face of jury instructions confined to the law of manslaughter and telling the jury that the defendant could only be found guilty of manslaughter, few could doubt that such judgment would be speedily reversed on appeal. And if the judgment were nevertheless affirmed on appeal because the appellate court deemed the evidence sufficient to support a conviction of murder, few could doubt that the affirmance reflected a palpable denial of due process of law.

In the present case, moreover, it is apparent that the law of sales announced in the opinion of the appellate court is in conflict with the decisions of this court, its own decisions, and the decisions in other circuits on the subject. In other words, that the law of the case as declared by the trial court was right and the law as revised in the appellate court was wrong.

The Circuit Court of Appeals decided that petitioner had made an actual sale of whiskey. (R. 53-54.) This conclusion was based upon undisputed evidence showing the following: Petitioner agreed to sell 100 cases of whiskey for $4600 and accepted a deposit of $1975; he did not have title to any whiskey;

he did not control any whiskey; he had no whiskey to transfer; no specific whiskey was ever identified as the subject of sale; no whiskey was ever delivered; the deposit of $1975 was returned. (R. 16-18; 19-25; 26-28; 31-32.)

Under the settled law of sales, the foregoing circumstances defeated a conclusion that petitioner sold whiskey.

State of Iowa v. McFarland, 110 U.S. 471, 478, 4 S. Ct. 210, 214, 28 L. Ed. 198.

Hawaiian Gas Products Co. v. Comm. Int. Rev., 9 Cir., 126 F. 2d 4, 5.

Rogers v. Comm. Int. Rev., 9 Cir., 103 F. 2d 790, 792.

Perata v. Comm. Int. Rev., 9 Cir., 89 F. 2d 550, 552.

Fox v. United States, 4 Cir., 34 F. 2d 99, 100.

In *Hawaiian Gas Products Co. v. Comm. Int. Rev.,* 9 Cir., 126 F. 2d 4, it was said, at page 5:

> " 'A sale', said the Supreme Court in the Five Per Cent Cases (State of Iowa v. McFarland, 110 U.S. 471, 478, 4 S. Ct. 210, 214, 28 L.Ed. 198), 'in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent'."

In *Perata v. Comm. Int. Rev.,* 9 Cir., 89 F. 2d 550, it was said, at page 552:

> "The distinction between a contract of sale and a sale is shown in 55 C.J. 39, sec. 5: 'A contract to sell goods, as distinguished from a sale, is a contract whereby the seller agrees to transfer

the property in goods to the buyer for a price which the buyer pays or agrees to pay, as where there is no price paid for the goods and no delivery of them. * * * A contract to sell is merely a promise of an executory nature, and until it is executed gives merely a right of action for its breach, or specific performance, and does not pass the property in goods or chattels, whereas a sale is in the nature of a conveyance or transfer of title'."

And in *Fox v. United States,* 4 Cir., 34 F. 2d 99, where a conviction for sale in violation of the National Prohibition Act was reversed, the court said, at pages 99 and 100:

(99) "In the second place, there was no delivery of liquor by the defendant or by any one acting in his behalf. The statute (27 USCA, sec. 12) provides that, 'no person shall manufacture, *sell,* barter, transport, import, export, (100) deliver, furnish or possess any intoxicating liquor,' etc., and the violation of the statute with which defendant is charged is selling. An executory contract to sell might, in a proper case, constitute a conspiracy to violate the act * * *; but there could not be a sale in violation thereof unless the sale were completed by delivery, either actual or constructive, which is not present in this case. 'The offense of illegally selling liquor is not committed by a bargain or executory contract for a sale. There must be a completed sale, which passes the property, consummated by the act of the parties as distinguished from the operation of law, and amounting to a vending and purchasing of the par-

ticular commodity.' (33 C.J. 591; Filatreau v. United States, 14 F. 2d 659; * * *.)

It is elementary that a sale involves a transfer of title, and that there can be no sale until a specific chattel has been ascertained and identified. Here there was no transfer of title to any intoxicating liquor and no liquor was ascertained or identified as the subject of sale. The most that can be said, even if the transaction between defendant and Allen be construed as a bona fide agreement on the part of defendant to deliver liquor to Allen, is that there was a mere executory contract to sell. This is not a sale. The distinction is pointed out in Mechem on Sales, par. 5, quoting Chalmers on Sales, as follows:

' "By an agreement to sell," it has been said "a jus in personam is created; by a sale a jus in rem is transferred. If an agreement to sell be broken, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes. * * * But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against him, but also the usual proprietary remedies against the goods themselves, such as an action for conversion and detinue." '

The distinction is well stated by Prof. Williston in the second edition of Williston on Sales, par. 2, as follows:

'Whether a bargain between parties is a contract to sell or an actual sale depends upon whether the property in the goods is transferred. If it is transferred, there is a sale, an

executed sale, even though the price be not paid. Conversely, though the price be paid, there is but a contract to sell (not very happily called an executory sale), if the property in the goods has not passed. * * * '

In Filatreau v. United States, 14 F. 2d 659, the Circuit Court of Appeals of the Sixth Circuit Court held that there was no sale within the prohibition of the statute where there was no delivery even though the contract had been agreed and the whiskey had been sent for and was ready to be delivered."

CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment of said court in said cause be reviewed and reversed.

Dated, San Francisco, California,
March 20, 1946.

MAX H. MARGOLIS,
Counsel for Petitioner.

FRED MCDONALD,
Of Counsel.

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CITATIONS

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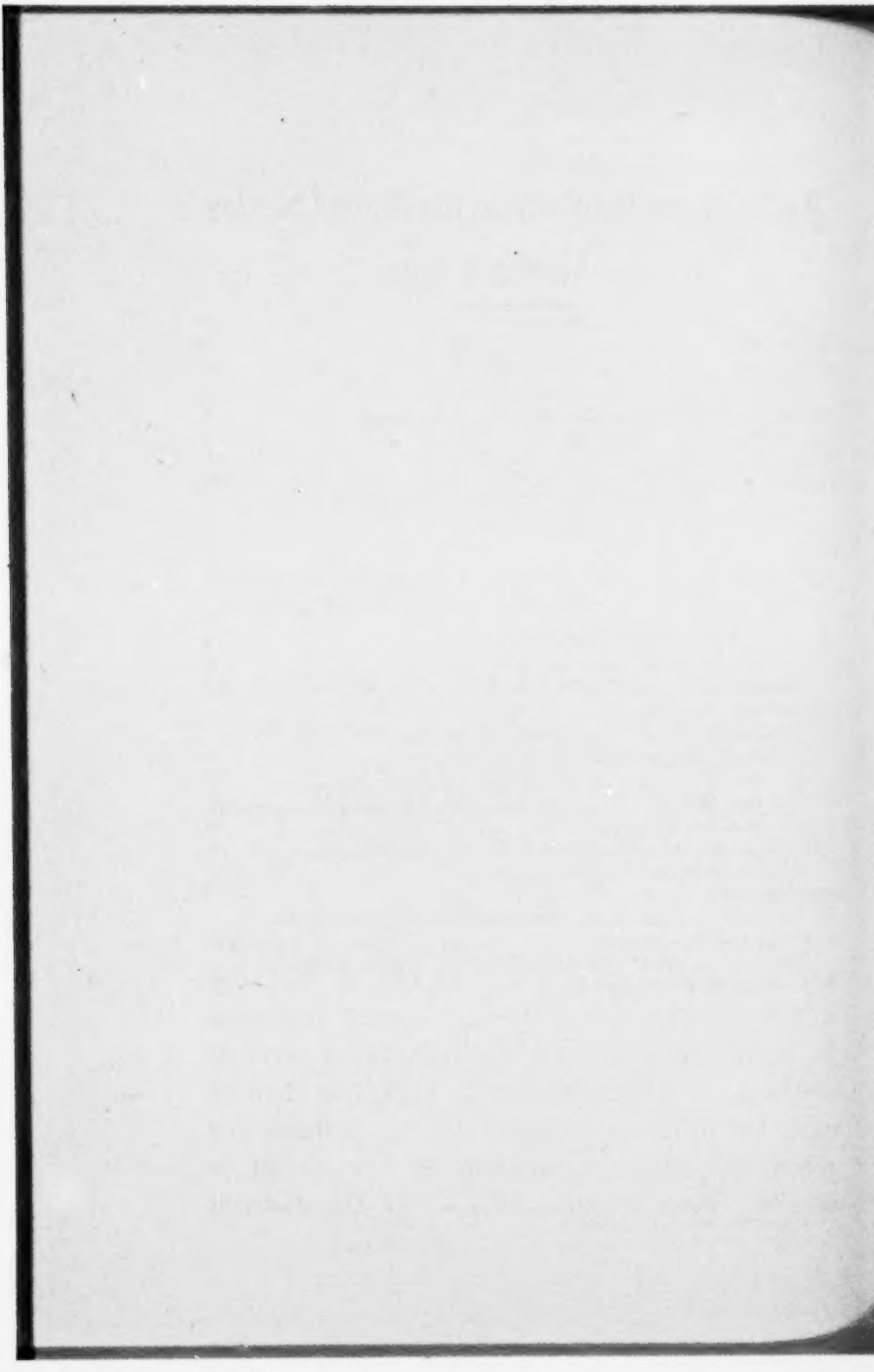

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 995

T. A. SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 50–54) is reported at 153 F. 2d 144.

JURISDICTION

The judgment of the circuit court of appeals was entered January 25, 1946 (R. 54–55), and a petition for rehearing was denied February 26, 1946 (R. 55). The petition for a writ of certiorari was filed March 25, 1946, less than 30 calendar days after denial of the petition for rehearing. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925.[1]

QUESTION PRESENTED

Whether a general verdict of "guilty" on an information charging a "sale" of whiskey by petitioner at a price in excess of the ceiling price established under the Emergency Price Control Act will support a conviction, where the jury was instructed that the proof did not as a matter of law support the charge of a sale but that they could find petitioner guilty if they found an attempt to sell.

STATUTE INVOLVED

The Emergency Price Control Act of January 30, 1942, 56 Stat. 23, as amended, provides in pertinent part:

> SEC. 4. (a) (50 U. S. C.App., Supp. IV, 904 (a)). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under

[1] The petition is timely whether it be governed by Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934, or by Rules 37 (b) (2) and 45 (a) of the new Rules of Criminal Procedure, which became effective March 21, 1946.

section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

SEC. 205. (b) (50 U. S. C. App., Supp. IV, 925 (b)). Any person who willfully violates any provision of section 4 of this Act, * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

Section 1035 of the Revised Statutes (18 U. S. C. 565) provides:

> In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense.

STATEMENT

An information was filed against petitioner in the District Court for the Northern District of California charging that he did willfully "sell" 100 cases of whiskey at a price in excess of the maximum price established by Maximum Price Regulation No. 445 (8 F. R. 11161), in violation of the Emergency Price Control Act of 1942 (R. 2–3). Petitioner was found "guilty" and he was sentenced to imprisonment for 6 months (R. 10–

11). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the conviction was affirmed (R. 54–55). The undisputed evidence[2] may be summarized as follows:

In early October 1943, at Redwood City, California, petitioner, business manager of the local bartenders' union, discussed with F. W. Larkin, a tavern owner, the possibility of getting some whiskey for the latter (R. 19). About October 5, 1943, petitioner returned to Larkin's place of business and told him that he could get hold of 100 cases of of Baltimore Club Special Reserve whiskey at a price of $46.50 per case (R. 19, 31). Under Maximum Price Regulation 445 the then effective ceiling price for that whiskey was approximately $27.00 per case.[3] Petitioner was aware of the approximate ceiling price (R. 26, 32). Larkin contacted two other tavern keepers who also needed whiskey and the three collectively gave checks totalling $2,940, or $19.75 per case, to petitioner as a down payment for the 100 cases he agreed to obtain (R. 19–20, 30, 32). The balance of the money was to be collected when Larkin obtained the whiskey at the local warehouse where it was

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[2] Petitioner did not offer any evidence in his own behalf (see R. 34).

[3] Section 5.4 (b) of Maximum Price Regulation 445, applicable to this transaction, establishes a wholesaler's ceiling of net cost plus 15% markup. Testimony showed that this would be between $26.60 and $27 per case for the particular whiskey (R. 16–17).

allegedly stored (R. 20). Larkin was unable to get the whiskey when he went to this warehouse, the persons in charge there stating that they knew nothing about the transaction with petitioner (R. 20). The fact was that the whiskey could not be released because of an existing restraining order (R. 17, 33). Thereafter, petitioner visited Larkin's place of business and returned the down payment of $2,940 (R. 23).

At the close of the testimony, the trial judge told counsel out of the presence of the jury, that he was going to "tell the jury that there was no sale but there was an attempted sale" of the liquor in question (R. 35), and thereafter in charging the jury, the judge instructed them, *inter alia,* as follows:

> I instruct you that the facts adduced at the trial do not support the charge in the information that the defendant made an actual sale of whiskey to said Larkin, because he at no time had title to the whiskey nor was he able to secure such title. It might be found from the evidence, however, that there was an [33] abortive sale or a contract to sell goods which the seller was unable to carry out.
>
> In all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or may be found guilty of an attempt to commit the offense charged,

> if such attempt be itself a separate offense. (R. 36.)
>
> * * * * *
>
> Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey, nor could he get it. The whiskey involved here was restrained from sale by an order of this court. But as I have said to you, if after a consideration of all of the evidence in the case and applying thereto the instructions which I will give to you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise you must acquit him. (R. 38.)

At the close of his charge, the judge had the clerk give the jury the usual form of verdict, which read, "We, the jury, find the defendant, T. A. Small, the defendant at bar," followed by a blank line for the verdict itself and another blank line for the signature of the foreman. No exceptions were taken to the court's charge or to the form of verdict. (R. 41.) The jury returned a general verdict of guilty (R. 6–7).

ARGUMENT

Petitioner urges that the general verdict of "guilty" must be construed solely in the light of the information, which charged petitioner with having made a "sale" in violation of the Emergency Price Control Act and regulations

issued thereunder, and that, so construed, the verdict was contrary to the binding instructions of law delivered by the trial judge (Pet. 5–7). Petitioner argues that the trial judge's instruction of law that there was no sale, whether or not erroneous, was binding on the circuit court of appeals as well as the jury and that the verdict cannot be supported on any conclusion of law to the contrary (Pet. 7–9). He further argues that in any event the law of sales supports the trial judge's charge that there was no sale in this case (Pet. 10–13).

Petitioner's conclusion that the jury in effect ignored the judge's instruction that there was no sale can be arrived at only by tortured construction of the verdict. It is true that the information charged the defendant only with a sale, but the judge gave the jury clear and unequivocal instructions under which they could not consider the question of sale but could only find petitioner guilty if they concluded there was an attempt to sell. Without objection or exception, the case went to the jury with the issues thus clearly framed for them. And again without objection or exception, the jury was given a form of verdict which lent itself only to the addition by the jury of the words "guilty" or "not guilty." Thus, examination of all the relevant circumstances preceding the verdict can lead only to the conclusion that the jury found petitioner guilty of an attempt to sell within the limitations

of the instructions that had been given them. Cf. *Freeman* v. *United States,* 96 F. 2d 13 (C. C. A. 5).

The only authority cited by petitioner in support of his construction of the verdict is *St. Clair* v. *United States,* 154 U. S. 134 (Pet. 6), in which this Court held that a general verdict of guilty on an indictment for murder was to be construed to import a conviction for that offense only, even though the jury might have found the defendant guilty of some lesser crime necessarily included within the one charge. But the *St. Clair* case factually was far different from the instant one. There was nothing in that record, and particularly in the trial judge's charge to the jury which, as in the instant case, narrowed the issue for the jury so that its verdict must be construed other than with respect to the indictment alone. Moreover, the entire opinion in that case, relevant portions of which are omitted in petitioner's quotation, shows that in construing a verdict one must look to the entire record to find the jury's intention. Immediately preceding the portion of the opinion quoted by petitioner (Pet. 6), this Court stated as follows (154 U. S. at 154):

> * * * We said in *Pointer's case* that, while the record of a criminal case must state what will affirmatively show the offence, the steps without which the sentence cannot be good, and the sentence itself, all parts of the record must be interpreted to-

> gether, giving effect to every part if possible, and supplying a deficiency in one part by what appears elsewhere in the record. 151 U. S. 396, 419.

There can be no question here as to the validity of the verdict, construed as a finding that petitioner was guilty of an attempt to sell. Under R. S. § 1035, 18 U. S. C. 565 (*supra,* p. 3), a defendant may be found guilty under an information charging a sale in violation of the Emergency Price Control Act, if found guilty of an attempt to commit the offense so charged, since an attempt to sell at a price in excess of the ceiling price is a distinct offense under Section 4 (a) of that Act, and under Section 205 (b) thereof, carries the same degree of punishment as an illegal sale (*supra,* pp. 2–3).

While we have no doubt that the verdict is not open to the construction contended for by petitioner, if petitioner felt that it was, he should have raised the question before the jury was dismissed. See *Grace* v. *United States,* 4 F. 2d 658, 662 (C. C. A. 5), certiorari denied, 268 U. S. 702; *Jay* v. *United States,* 35 F. 2d 553, 554–555 (C. C. A. 10). His failure to take prompt action to correct the claimed ambiguity in the verdict is in effect a waiver of such claim.

In any event, the instruction given by the trial judge that there was no sale was one to which petitioner was not entitled, since the statute under which he was charged expressly includes his ac-

tivities within the definition of the word "sale." Section 302 (a) of the Emergency Price Control Act[4] defines the term "sale" to include "contracts and offers to [sell]." Petitioner's activities in respect of which he was charged clearly fall within this inclusive definition of "sale." *United States* v. *Weiss*, 150 F. 2d 17, 19 (C. C. A. 2). Whether, under the general law of sales as applied to the facts of this case,[5] he may be said to have made a contract to sell or merely an offer to sell, he made a "sale" within the coverage of the controlling definition of the Act and, therefore, the jury's verdict is fully supportable even if it were to be construed as responsive only to the charge as set forth in the information.

CONCLUSION

The decision below is correct, and there is involved no question of importance or real conflict

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[4] This section, 50 U. S. C. App., Supp. IV, 942 (a), provides:

"(a) The term 'sale' includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms 'sell,' 'selling,' 'seller,' 'buy,' and 'buyer,' shall be construed accordingly."

[5] The gist of petitioner's argument with reference to the law of sales is that there was no sale here because title had not passed and, in fact, petitioner was unable to obtain any liquor to pass to the tavern keepers. However, these facts would not under the general law of sales preclude the conclusion that there was a sale where all the elements of a contract of sale existed. *United States* v. *Weiss*, 150 F. 2d 17, 19 (C. C. A. 2).

of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

APRIL 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946